MIGRATION, SEXUAL ORIENTATION, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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AT A GLANCE

Issues relating to migration have long been aspects of the discrimination that gay men and lesbians in Europe have experienced and attempted to challenge by using the European Convention on Human Rights. In this article, we critically assess the ways in which the European Court of Human Rights has developed the protection of sexual minorities under the Convention in respect of two aspects of migration: residency and asylum. We consider a number of issues that have been addressed by the Court, such as the extent to which bi-national same-sex couples should have the right to remain together in a Council of Europe member state, and the protection that should be extended to gay and lesbian asylum seekers attempting to resist repatriation to a country where they would not be free to establish a sexual relationship with a same-sex partner. Our analysis of the Court's jurisprudence shows the existence of a 'two track' system in which the Court adopts a dynamic interpretation of the Convention in respect of residency but a conservative interpretation of the Convention in respect of asylum. We argue that this approach is problematic because, not only is it inconsistent with the Court's general principles on asylum, it systematically fails to protect gay men and lesbians from having to live in circumstances where they would have no opportunity to establish a private and family life.

KEYWORDS

Asylum, Discrimination, Family life, Migration, Residency, European Court of Human Rights

INTRODUCTION

Since 1981, gay men and lesbians have attempted to utilize the European Convention on Human Rights (hereinafter 'the Convention') [1] to challenge discrimination against them on the grounds of their sexual orientation in respect of a number of issues related to migration. In this article we consider the ways in which the Convention organs – the European Court of Human Rights (hereinafter 'the Court') and the former European Commission of Human Rights (hereinafter 'the Commission') – have responded to complaints brought by gay men and lesbians in respect of two aspects of migration. The first aspect concerns discrimination in respect of 'residency' that has prevented bi-national same-sex couples being able to remain together in certain Council of Europe (hereinafter 'CoE') member states on the basis of an intimate relationship. The second aspect concerns 'asylum' and the refusal of certain CoE member states to accommodate those who have left states outside of the CoE in order to avoid discrimination on the grounds of sexual orientation.

Applications to the Court about sexual orientation discrimination and residency or asylum concern a number of issues related to 'private life' and 'family life'. For example, in respect of residency, gay men and lesbians have gone to the Court to challenge immigration provisions that allow the different-sex partner of a national of a CoE member state to enter and remain in that state for the purpose of establishing a family life, but deny this opportunity to the same-sex partner of a national of a CoE state. Furthermore, in respect of asylum, gay and lesbians applicants have often complained to the Court that a CoE member state has refused to accommodate them after they have left a country of origin to avoid suffering ill-treatment because of their sexual orientation or because they engaged in a same-sex sexual relationship. In taking complaints to the Court about discrimination based on sexual orientation in respect of both residency and asylum, gay and lesbians applicants have sought to address a number of issues relating to the private and family lives of those who are already nationals of or legally resident within CoE member states, as well as issues relating to the private and family lives of those seeking to enter into or become nationals of CoE member states. However, all of the complaints made to the Court about sexual orientation discrimination and residency and asylum ultimately concern one key issue, which is the extent to which the Convention protects a gay or lesbian individual seeking to migrate to a CoE member state, in order to pursue a private

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005.

and family life on the basis of their sexual orientation, from attempts by national authorities of CoE member states to frustrate that migration.

Since 2010, building on its earlier jurisprudence in respect of sexual orientation and private life, the Court has repeatedly held that a same-sex couple enjoys the protection of the right to respect for family life guaranteed by Article 8 of the Convention (right to respect for private and family life).[2] Moreover, the Court has engaged in a dynamic interpretation of the Convention to develop comprehensive protections for gay men and lesbians in respect of a number of aspects of discrimination in European societies. The Court has determined that 'if the reasons advanced for […] a difference in treatment were based solely on considerations regarding [a person's] sexual orientation this would amount to discrimination under the Convention'.[3] In stark contrast, however, in respect of issues related to migration the Court has shown a remarkable unwillingness to address discrimination on the grounds of sexual orientation. Until 2016, when three applications by migrants succeeded in the Court,[4] the Convention organs had not upheld any complaint by a gay or lesbian applicant concerning sexual orientation discrimination in respect of any aspect related to migration. As a consequence, Convention jurisprudence on sexual orientation discrimination and migration remains largely undeveloped.

Our principal aim in this article is to critically analyse the Court's jurisprudence on residency and asylum and to propose ways in which it might be evolved to enhance the protection of sexual minorities. We begin by providing an overview of Convention jurisprudence in respect of migration and sexual orientation discrimination. We then turn to examine in detail the Court's jurisprudence on residency. We trace the development of this jurisprudence from the decisions of the former Commission, which denied that same-sex relationships fell within the scope of the family life limb of Article 8, to the Court's recent jurisprudence, which has introduced new safeguards against sexual orientation discrimination in respect of family

[2] See *Schalk and Kopf v Austria*, no. 30141/04, 24 June 2010, § 94; *Vallianatos and Others v Greece* [GC], nos. 29381/09 and 32684/09, 07 November 2013, § 73; *Oliari and Others v Italy,* nos. 18766/11 and 36030/11, 21 July 2015, § 103.

[3] *E.B. v France* [GC], no. 43546/02, 22 January 2008, § 93. See also *Kozak v Poland*, no. 13102/02, 02 March 2010, § 92.

[4] *Pajić v Croatia*, no. 68453/13, 23 February 2016; *Taddeucci and McCall v Italy*, no. 51362/09, 30 June 2016; *O.M. v Hungary*, no. 9912/15, 05 July 2016.

reunification and residence permits. We then turn to examine in detail the Court's jurisprudence on asylum. In providing an in-depth analysis of the complaints brought about sexual orientation discrimination and asylum we demonstrate that the approach of the Court, which has been to declare the majority of such complaints inadmissible or to strike them out, is inconsistent with the Court's general principles on asylum and fails to protect gay men and lesbians seeking to escape from discrimination in their country of origin. In conclusion, we suggest that the Court has approached residency and asylum complaints in fundamentally different ways and, in doing so, has created a 'two track' system in respect of sexual orientation discrimination and migration that is inconsistent and flawed.

MIGRATION AND SEXUAL ORIENTATION DISCRIMINATION: AN OVERVIEW OF CONVENTION JURISPRUDENCE

Over the six decades that gay men and lesbians have been taking complaints to the Convention organs about discrimination on the grounds of sexual orientation,[5] the Court or former Commission have issued decisions or judgments in 23 such cases relating to migration. Seven of these cases principally concern allegations of sexual orientation discrimination by bi-national same-sex couples who had been refused permission to reside together, on the basis of their intimate relationship, in a member state of the CoE.[6] The other 16 cases principally concern complaints about decisions made by authorities in CoE member states about asylum applications based on alleged sexual orientation discrimination.[7] For analytical purposes we

[5] For a broad history of the Convention jurisprudence on sexual orientation discrimination, see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).

[6] *X. and Y. v the United Kingdom* (dec), no. 9369/81, 03 May 1983; *W. J. and D. P. v the United Kingdom* (dec), no. 12513/86, 13 July 1987; *C. and L.M. v the United Kingdom* (dec), no. 14753/89, 09 October 1989; *Z.B. v the United Kingdom* (dec), no. 16106/90, 10 February 1990; *Cardoso and Johansen v the United Kingdom* (dec), no. 47061/99, 05 September 2000; *Pajić v Croatia*, above note 4; *Taddeucci and McCall v Italy*, above note 4.

[7] *Sobhani v Sweden* (dec), no. 32999/96, 10 July 1998; *F. v the United Kingdom* (dec), no. 17341/03, 22 June 2004; *I.I.N. v the Netherlands* (dec), no. 2035/04, 09 December 2004; *Ayegh v Sweden* (dec), no. 4701/05, 07 November 2006; *D.B.N. v the United Kingdom* (dec), no. 26550/10, 31 May 2011; *K.N. v France and other applications* (dec), no. 47129/09, 19 June 2012; *A.S.B. v the Netherlands* (dec), no. 4854/12, 10 July 2012; *M.K.N. v Sweden*, no. 72413/10, 27 June 2013; *M.E. v Sweden* (striking out) [GC], no. 71398/12, 08 April 2015 (see also: *M.E. v Sweden*, no. 71398/12, 26 June 2014); *A.E. v Finland* (dec), no. 30953/11, 22 September 2015; *A.N. v France* (dec), no. 12956/15, 19 April 2016; *M.B. v Spain* (dec), no. 15109/15, 13 December 2016; *O.M. v*

treat these residency and asylum cases separately but, as we explain below, occasionally some cases involve both sets of issues.[8]

The first complaint relating to sexual orientation discrimination in respect of residency was lodged with the Commission in 1981,[9] the same year in which the Court held that Article 8 of the Convention secures the human right for adults to engage in private and consensual same-sex sexual acts without the risk of prosecution.[10] The applicants, a same-sex couple comprising British and Malaysian citizens, claimed that the expulsion of the Malaysian man from the United Kingdom would amount to a violation of Article 8 of the Convention, but the Commission rejected this claim as manifestly ill-founded. The first complaint relating to asylum on the grounds of sexual orientation was lodged with the Commission in 1990 and addressed the removal of a Cypriot citizen from the United Kingdom to the Turkish Republic of Northern Cyprus, where private and consensual same-sex sexual acts were a criminal offence.[11] The applicant claimed that his removal would violate the private life limb of Article 8, because it would disrupt the same-sex relationship he had established with a British citizen,[12] and expose him to the risk of prosecution and imprisonment. The Commission considered the application manifestly ill-founded and declared it inadmissible.

Until 2013, all complaints lodged with the Court or Commission by gay men and lesbians relating to residency and asylum had been declared inadmissible or struck out. Between 2013 and 2015 the Court did declare admissible and issue judgments on two applications related to sexual orientation discrimination and asylum, but found no violation of the Convention.[13] It was only in 2016 that the Court held, for the first time, that a difference in treatment on the grounds of sexual orientation in respect of residency amounted to a violation of the

Hungary, above note 4; *H.A. and H.A. v Norway* (dec), no. 56167/16, 03 January 2017; *A.T. v Sweden* (dec), no. 78701/14, 25 April 2017; *M.B. v the Netherlands* (dec), no. 63890/16, 28 November 2017.

[8] See, for instance, *Z.B. v the United Kingdom* (dec), above note 6; *M.E. v Sweden*, above note 7.

[9] *X. and Y. v the United Kingdom* (dec), above note 6.

[10] *Dudgeon v the United Kingdom,* no. 7525/76, 22 October 1981.

[11] *Z.B. v the United Kingdom* (dec), above note 6. The Commission considered the applicant as a Cypriot national although he lived in the Turkish Republic of Northern Cyprus.

[12] Ibid. The applicant also invoked Article 14 taken in conjunction with Article 8. For a discussion of this case, see below.

[13] *M.K.N. v Sweden,* above note 7; *M.E. v Sweden,* above note 7.

Convention.[14] The same year, the Court found a violation of the Convention in two further cases relating to residency[15] and asylum.[16]

[Figure 1]

Figure 1 shows the number of applications addressed by the Court and former Commission in respect of issues relating to sexual orientation discrimination and migration, in comparison to applications concerning all other sexual orientation discrimination issues. As Figure 1 shows, the number of applications relating to migration remained stable between 1981 and 2000, with three applications per decade, while slightly increasing between 2000 and 2009, reaching the number of five complaints in that period. This upward trend, however, rapidly escalated between 2010 and 2017 when, significantly, applications lodged about sexual orientation discrimination in respect of migration outnumber applications lodged about all other sexual orientation discrimination issues. Moreover, the number of applications about sexual orientation discrimination in respect of migration during this seven-year period equals the total number of similar complaints made in the three previous decades. This recent 'spike' in applications is due to an increase in applications made by asylum seekers, which account for 11 of the 12 applications relating to sexual orientation discrimination and migration lodged with the Court during the last seven years.

The increase in applications to the Court during the last seven years by gay and lesbian asylum seekers – which are usually made by individuals from a country of origin in which same-sex sexual acts are a criminal offence – may be explained by a number of inter-related factors, such as the lack of national guidelines to assess the credibility of migrants seeking asylum on the grounds of sexual orientation[17] and the legal support that national and international NGOs

[14] *Pajić v Croatia*, above note 4.

[15] *Taddeucci and McCall v Italy*, above note 4.

[16] *O.M. v Hungary,* above note 4.

[17] For an overview of the way in which procedures adopted in CoE member states to assess the credibility of migrants seeking asylum on the grounds of their sexual orientation contribute to create problematic rejection rates, see: S. Jansen and T. Spijkerboer, *Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity* (VU University of Amsterdam, 2011).

provide to gay and lesbians asylum seekers in assisting them to make complaints to the Court.[18] The corresponding decline in applications over the last seven years concerning discrimination against same-sex couples in respect of residency can be explained by at least three inter-related factors. First, during the last two decades the Court has significantly reduced the margin of appreciation afforded to national authorities to treat same-sex couples differently to different-sex couples.[19] The Court has, indeed, upheld a number of complaints about forms of discrimination against same-sex couples[20] and, although not directly related to issues of migration, can be seen to have encouraged CoE member states to amend their immigration laws to remove discriminatory provisions. Secondly, the adoption by the Committee of Ministers of the CoE of Recommendation CM/Rec(2010)5, which recommends that CoE member states examine existing legislation and adopt new measures in order to combat sexual orientation discrimination, can also be seen to have encouraged CoE states to remove discriminatory provisions from their immigration laws.[21] Thirdly, as we explore below, the

[18] For instance, Ilga Europe – European International Lesbian, Gay, Bisexual, Transgender and Intersexual Association – supports litigation before European Courts, by facilitating training on this issue to member organisations and by submitting third party interventions with partner organisations. In the UK, the UKLGIG – UK Lesbian and Gay Immigration Group – provides legal support to individuals claiming asylum on the grounds of their sexual orientation and drafts policy proposals challenging the procedures currently adopted to assess the credibility of gay and lesbian migrants seeking to live in the UK.

[19] In this respect, CoE member states are aware that they may fall foul of the Convention if they enact or enforce legal provisions which represent 'a predisposed bias on the part of a heterosexual majority against a homosexual minority' (*Smith and Grady v the United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999, § 97). See also *Identoba and Others v Georgia*, no. 73235/12, 12 May 2015, § 65; *Bayev and Others v Russia*, nos. 67667/09 and 2 others, 20 June 2017, § 68.

[20] See, for instance *Karner v Austria* (no. 40016/98, 24 July 2003) and *Kozak v Poland* (above note 3), where the Court considered the exclusion of the applicants from the right to succeed in the tenancy of the deceased same-sex partner's home in violation of Article 14 read in conjunction with Article 8. See also: *Oliari and Others v Italy* (above note 2), where the Court for the first time found that the inability of same-sex couples to gain some form of legal recognition of their relationships other than marriage - in a country which at that time only offered marriage to different-sex couples- amounted to a violation of the private and public life limb of Article 8.

[21] The Parliamentary Assembly has also adopted various recommendations and resolutions to address sexual orientation discrimination in relation to migration. For instance, in the Recommendation 1470 (2000) addressing the 'situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe', the Assembly urged member states to 'take such measures as are necessary to ensure that bi-national lesbian and gay couples are accorded the same residence rights as bi-national heterosexual couples', and in the Resolution 1728 (2010), addressing the 'discrimination on the basis of sexual orientation and gender identity' it called for measures 'to ensure that, where one partner in a same-sex relationship is foreign, this

Court has recently directly addressed discrimination on the grounds of sexual orientation in respect of residency by finding that denying same-sex couples the opportunity available to different-sex couples to obtain family reunification amounts to a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the Convention.[22]

The Court's current jurisprudence on sexual orientation discrimination and residency, and sexual orientation discrimination and asylum, is founded on distinct and diverse legal principles. This is despite the fact that, as we outlined above, this jurisprudence has emerged from cases in which complaints relating to residency and complaints relating to asylum have sometimes been interconnected. Indeed, the first complaint to the Commission relating to refoulement and sexual orientation in 1990 was combined with a complaint about discrimination in respect of residency rights. In that case, the applicant advanced the dual claim that 'the implementation of the decision to remove him to a jurisdiction where he would be subject to prosecution and imprisonment for homosexual activities', and the 'forceable separation' from his British same-sex partner, amounted to a violation of Article 8 of the Convention.[23] In doing this, the applicant was challenging both the discrimination inherent in United Kingdom immigration law[24] and the refoulement implications of returning a gay person to a country that criminalized same-sex sexual acts. However, the Court has gone on to develop separate approaches to dealing with sexual orientation discrimination in respect of asylum and residency which has produced a 'two track' system. Such a system is, as we argue below,

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partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship'. Council of Europe Parliamentary Assembly, 'Recommendation 1470 (2000) Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe' adopted by the Parliamentary Assembly on 30 June 2000 at the 24th sitting of the Assembly; Council of Europe Parliamentary Assembly, 'Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity' adopted by the Parliamentary Assembly on 29 April 2010 at the 17th sitting of the Assembly. See also: Council of Europe Committee of Ministers, 'Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity' adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

[22] *Pajić v Croatia*, above note 4, §§ 85-86; *Taddeucci and McCall v Italy*, above note 4, §§98-99.

[23] *Z.B. v the United Kingdom* (dec), above note 6. The applicant also relied on Article 14 to claim that the decision to remove him amounted to sexual orientation discrimination.

[24] Ibid. Unlike in respect of different-sex couples, British immigration laws made no provision for bi-national same-sex couples to apply for the residency of a foreign partner on the basis of his or her relationship with a British national.

problematic because whilst the Court has evolved its jurisprudence on sexual orientation discrimination and residency to enhance the protection available to same-sex couples under the Convention, its jurisprudence on asylum and sexual orientation discrimination remains static and unresponsive to the needs of gay men and lesbians seeking protection.

THE COURT'S JURISPRUDENCE ON SAME-SEX COUPLES AND RESIDENCY

In this section, we examine the evolution of the Court's jurisprudence on same-sex couples and residency rights. The foundations of this jurisprudence are the decisions of the former Commission in respect of complaints made by one or both of a bi-national same-sex couple who had been refused a residence permit in a CoE member state on the grounds of their intimate relationship. There was a 26 year gap between the last such complaint being declared inadmissible by the Commission[25] and the first such complaint being considered on the merits by the Court.[26] When the Court did consider such a complaint on the merits for the first time it found a violation of the Convention and, as a result, instigated a sharp break from the approach fashioned by the Commission in its earlier decisions.[27] As we outline below, the approach to family life taken by the Commission – which was built on an interpretation of the Convention that was hostile to bi-national same-sex couples – has been fundamentally transformed by the Court and new important protections have been established.

The foundations of Convention jurisprudence on same-sex couples and residency

The earliest decisions of the former Commission in respect of applications relating to residency and sexual orientation discrimination are particularly interesting because they constitute some of the first attempts by gay men and lesbians to argue that same-sex relationships fall within the meaning of the right to respect for family life guaranteed by Article 8 of the Convention. Although the Commission had previously given consideration to the sexual relationships of gay men in response to complaints about the criminalisation of male same-sex sexual acts and

[25] Ibid.

[26] *Pajić v Croatia*, above note 4. In this lapse of time the Court considered *Cardoso and Johansen v the United Kingdom* (dec), above note 6, but the parties reached an agreement before the Court could address the merits and the case was struck out.

[27] Ibid.

discrimination in the 'age of consent',[28] it was not until gay men and lesbians first attempted to use the Convention in the early 1980s to address discrimination in respect of residency that the Commission gave consideration to the broader aspects of same-sex relationships. In attempting to use the Convention to address 'the failure to treat their relationship in the same manner as that of heterosexuals',[29] gay men and lesbians were seeking to establish that the family life of a same-sex couple was as worthy of legal protection as the family life of a different-sex couple.

In *X. and Y. v the United Kingdom*, for example, a same-sex cohabiting couple relied on Article 8 of the Convention to allege that the refusal by immigration authorities 'to allow the first applicant to remain in the United Kingdom' with the second applicant amounted to an interference with their right to respect for family life.[30] Similarly, in *C. and L.M. v the United Kingdom* the applicants, an Australian woman in a stable relationship with a British woman, and the daughter she had conceived by artificial insemination, relied on Article 12 of the Convention (right to marry) to challenge the decision to deport them.[31] The first applicant pointed out that she and her partner intended to raise the child and that the 'destruction of the family unit' interfered with the couple's right to found a family guaranteed by Article 12.[32] In response to such claims, the Commission refused to consider that same-sex relationships constituted a form of family life within the terms of the Convention. In *X. and Y. v the United Kingdom*, the Commission briefly stated that 'despite the modern evolution of attitudes towards homosexuality […] the applicants' relationship does not fall within the scope of the right to

[28] On the criminalisation of homosexuality, see: *Dudgeon v the United Kingdom*, no. 7525/76, Commission report, 13 March 1980, § 42. On the age of consent, see: *X. v the United Kingdom,* no. 7215/75, Commission report, 12 October 1978, § 31 and following.

[29] *W. J. and D. P. v the United Kingdom* (dec), above note 6. The same concept was expressed also in *C. and L.M. v the United Kingdom* (dec), above note 6, and *Z.B. v the United Kingdom* (dec), above note 6.

[30] *X. and Y. v the United Kingdom* (dec), above note 6. In the subsequent cases of *W. J. and D. P. v the United Kingdom* (dec), above note 6, and *Z.B. v the United Kingdom* (dec), above note 6, the applicants articulated their claims about same-sex relationships exclusively within the private life limb of Article 8, seeking to convey the idea that the protection of intimate relationships fell within the right to respect for private life secured by Article 8. In both cases the Commission rejected these claims as 'manifestly ill-founded'.

[31] *C. and L.M. v the United Kingdom* (dec), above note 6. The applicants relied also on the private and family life limb of Article 8 and on Article 14. The Commission considered both claims 'ill-founded'.

[32] Ibid.

respect for family life ensured by Article 8'.[33] Similarly, in *C. and L.M. v the United Kingdom,* the Commission concluded that the applicants could not claim to have suffered an interference with their rights under Article 12 because 'the first applicant's relationship with her lesbian cohabitee does not give rise to a right to marry and found a family within the meaning of Article 12'.[34] Despite the first applicant having emphasised that the second applicant's interests were best served by growing up in 'a stable monogamous relationship of two persons', the Commission would not regard the three people involved in the complaint to constitute a 'family' within the terms of the Convention.

The Commission applied similarly heteronormative requirements when considering the complaint of an applicant facing deportation to a country *inside* the CoE that criminalised same-sex sexual acts.[35] In *Z.B. v the United Kingdom* the applicant who, as we detailed above, was a foreign national in a long-term same-sex relationship with a British national complained, inter alia, that his deportation to Cyprus constituted an unjustified interference with his right to respect for private life under Article 8 of the Convention because it interfered with his stable relationship with his partner and the home and business they had set up together. The Commission rejected the application and, in doing so, argued that, whilst there was a 'possibility that the applicant will be subjected to hostility and social ostracism because of his homosexuality' and may 'be subject to the risk of prosecution for homosexual acts', 'the considerations relating to respect for private life in this case do not outweigh valid considerations relating to the proper enforcement of immigration controls'.[36] The Commission further concluded, under Article 14 in conjunction with Article 8, that 'the family […] merits special protection in society'[37] and, consequently, domestic authorities were entitled to 'give priority and better guarantees to established couples living in a family relationship as opposed to other established relationships such as lesbian or homosexual relationships'.[38]

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[33] *X. and Y. v the United Kingdom* (dec), above note 6.

[34] *C. and L.M. v the United Kingdom* (dec), above note 6.

[35] *Z.B. v the United Kingdom* (dec), above note 6.

[36] Ibid.

[37] Ibid. This passage encapsulates the Commission's perspective on same-sex relationships and it was reiterated also in *W.J. and D.P v the United Kingdom* (dec), above note 6, and *C. and L.M. v the United Kingdom* (dec), above note 6.

[38] Ibid. See also *C. and L.M. v the United Kingdom* (dec), above note 6.

The Commission's decisions on applications about discrimination suffered by bi-national same-sex couples in respect of residency demonstrate a remarkable unwillingness to depart from a heteronormative (and, some might argue, homophobic) interpretation of the Convention. However, the Commission's approach at this time was not inconsistent with general Convention jurisprudence regarding sexual orientation discrimination which, until 1999, was characterised by a refusal of the Convention organs to address any element of sexual orientation discrimination other than that related to the criminalization of same-sex sexual acts. At a time when the Convention organs were still reluctant to recognize that gay men and lesbians should enjoy the full range of 'sex rights' available to heterosexuals,[39] applications relating to the 'love rights of same-sex *partners*'[40] were predictably met with hostility and declared inadmissible by the Commission (Wintemute, 2005: 189).

Recent developments in the Court on same-sex couples and residency

The approach developed by the Commission remained in place until 2016, when the Court issued two judgments on the residency rights of same-sex couples. In *Paijc v Croatia* the Court considered a complaint by a national of Bosnia and Herzegovina who claimed that the refusal of Croatian authorities to grant her a residence permit on the grounds of family reunification with her same-sex partner amounted to a violation of her rights to respect for private and family life under Article 8 in conjunction with Article 14 of the Convention.[41] The same provisions of the Convention were also invoked in *Taddeucci and McCall v Italy* in which the applicants, a same-sex couple, complained about the Italian authorities' rejection of the request by the second applicant (a New-Zealand national) for a residence permit 'for family reasons'[42] to allow him to live in Italy with the first applicant (an Italian national).

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[39] Wintemute defines sex rights as 'focusing on discrimination against LGBT individuals because of their actual or presumed same-sex activity or their undergoing gender reassignment' and, in relation to gay men and lesbians, as ranging 'from criminalization of same-sex sexual activity […] to the denial of employment, housing or parental rights'. R. Wintemute, 'From Sex Rights to Love Rights: Partnership Rights as Human Rights' in N. Bamforth (ed), *Sex Rights* (Oxford University Press 2005), 189.

[40] With the term 'love rights' Wintemute addresses 'the denial of rights or benefits or recognition to any factually or legally same-sex partner an LGBT individual may have, including employment, housing and parental rights that the partner derives through his or her relationship with the individual.' (Ibid).

[41] *Pajić v Croatia*, above note 4.

[42] *Taddeucci and McCall v Italy*, above note 4.

In both *Pajić* and *Taddeucci and McCall* the applicants advanced claims about the need for protection of their 'family life' similar to those made in earlier complaints to the Commission. Significantly, however, neither the applicants nor the Court referred to the principles established by the Commission, rather focusing on the Court's recent jurisprudence concerning the legal recognition that should be available to same-sex couples in *de facto* same-sex relationships. However, the Italian government in *Taddeucci and McCall* did attempt to rely on the earlier decisions of the Commission to claim that the deportation of an alien who is in a same-sex relationship with a person in the host State does not amount to an interference with the Convention.[43] The Court rejected that claim and in both *Pajić* and *Taddeucci and McCall* held that cohabiting same-sex couples living in stable *de facto* partnerships fall within the scope of the family life limb of Article 8[44] and that the treatment of the applicants amounted to a violation of Article 14 taken in conjunction with Article 8.[45]

What *Pajić* and *Taddeucci and McCall* can be seen to represent is the Court's wholesale repudiation of a way of interpreting the Convention that had been entrenched in Convention jurisprudence for several decades. Whilst incremental evolution of Convention jurisprudence is an inevitable outcome of the Court's long-standing commitment to the principle that the Convention 'is a living instrument which […] must be interpreted in the light of present-day conditions',[46] the judgments in *Pajić* and *Taddeucci and McCall* are more of a seismic paradigm shift that establish new and important protections for individuals who are engaged in a same-sex relationship with a national of a CoE member state of which they are not a national. Significantly, this protection extends to any gay man or lesbian who is a national of a state

[43] Ibid, § 42.

[44] *Pajić v Croatia*, above note 4, § 67; *Taddeucci and McCall v Italy*, above note 4, § 60. See also *Schalk and Kopf v Austria*, above note 2, § 94; *P.B. and J.S. v Austria*, no. 18984/02, 22 July 2010, § 30; *Vallianatos and Others v Greece* [GC], above note 2, § 73; *X and Others v Austria* [GC], app no 19010/07, 19 February 2013, § 96; *Oliari and Others v Italy,* above note 2, § 164. For a discussion of the Court's jurisprudence on *de facto* same-sex relationships, see P. Johnson, 'Marriage, heteronormativity and the European Court of Human Rights: a reappraisal' (2015) *International Journal of Law, Policy and the Family* 29, 1, 56-77.

[45] Ibid, § 86; *Taddeucci and McCall v Italy*, above note 4, § 99.

[46] *Tyrer v the United Kingdom*, no. 5856/72, 25 April 1978, § 31. For a critical discussion of this doctrine, see E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) *International Law and Politics*, 31, 843-854.

outside of the jurisdiction of the Court and is engaged in an intimate same-sex relationship with a national of a CoE member state.

Three key principles can be seen to have been established by the Court in *Pajić* and *Taddeucci and McCall* in respect of the residency rights of bi-national same-sex couples. First, the Court can be seen to have considerably enhanced the protection available to bi-national same-sex couples under the family life limb of Article 8. Significantly, in *Pajić* the Court dismissed the government's objection that the relationship between the applicant and her partner did not amount to a form of family life because the couple did not live together. The Court stated that 'the fact of not cohabiting [with her same-sex partner] does not deprive the applicant's relationship of the stability which brings her situation within the scope of family life within the meaning of Article 8 of the Convention'.[47] The implication of this is that the Court has narrowed the margin of appreciation available to national authorities when defining the concept of family life for the purposes of residency rights. As a consequence, Convention jurisprudence can be seen to provide significant safeguards for bi-national same-sex couples seeking to establish a family life in a CoE member state.

Secondly, the Court has established that the exclusion of same-sex couples from immigration provisions available to different-sex couples can amount to discrimination under Article 14 of the Convention. For example, in *Taddeucci and McCall,* the principal issue at stake was the lack of any reference to same-sex couples in both immigration and family law. At that time, Italian immigration law did not allow unmarried partners of Italian nationals to apply for a residence permit for familial reasons.[48] Since Italian law does not permit same-sex marriage, same-sex couples 'faced an insurmountable obstacle to obtaining a residence permit for family reasons.'[49] The Court did not dispute that under Italian law unmarried different-sex couples would have been treated in the same way as the applicants, but it noted that only different-sex

[47] *Pajić v Croatia*, above note 4, § 67. See also *Vallianatos and Others v Greece* [GC], above note 2, § 73.

[48] *Taddeucci and McCall v Italy*, above note 4, § 21. In particular, the concept of 'family member' extended 'only to spouses, minor children, adult children who were not self-supporting for health reasons, and dependent relatives who lacked adequate support in their country of origin' (Ibid).

[49] Ibid, § 83. In accordance with the European Directive 2004/38/EC, the only exception concerned 'the partner with whom the [EU] citizen has contracted a registered partnership, on the basis of the legislation of a Member State' but the applicants could not invoke this provision, as the second applicant was not a EU citizen and they had registered their partnership in New Zealand (Ibid,§ 44).

couples had the possibility of marrying. The Court held that the applicants had been treated in the same way as different-sex unmarried couples who had decided not to marry and, therefore, this failed to recognize a difference in treatment on the basis of sexual orientation. On this basis the Court considered whether 'the failure to apply different treatment'[50] was acceptable under Article 14 and a majority concluded that – in contrast with the earlier approach of the Commission – it was not a justifiable means of protecting the 'traditional family'.[51]

Thirdly, and relatedly, the Court's conclusion in *Taddeucci and McCall* is significant because of the potential it provides for same-sex couples to challenge forms of discrimination that are created by their exclusion from marriage. Prior to this judgment, the Court had strongly established in its jurisprudence that distinctions based on sex or sexual orientation that are created by laws that restrict marriage and its rights and benefits to different-sex couples do not amount to violations of the Convention. The Court had consistently held that where rights and benefits are restricted to married couples, and where same-sex couples have no legal right to marry, a same-sex couple is not 'comparable to that of a married [different-sex] couple'.[52] Therefore, complaints brought under Article 14, taken in conjunction with Article 8, usually fall foul of the Court's 'analogous test' by which it assesses whether a distinction complained of concerns persons in relevantly similar situations. When the Court determines that a complainant is not in an analogous situation with a chosen comparator then it will not consider whether there is an objective or reasonable justification for an impugned distinction and, because the Court has a settled view that 'marriage confers a special status on those who enter into it',[53] it has been reluctant to consider unmarried couples as comparable to married couples for the purposes of Article 14. Although in *Taddeucci and McCall* the Court did not explicitly compare unmarried same-sex couples with married different-sex couples –preferring instead to focus on the fact that same-sex unmarried couples had been 'treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners'[54] – the

[50] Ibid, § 86.

[51] Ibid, § 93.This reiterates the principle expressed in *Schalk and Kopf v Austria* (above note 2, § 99) that 'same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships' and 'are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship'.

[52] *Gas and Dubois v France*, no. 25951/07, 15 March 2012, § 68.

[53] *Burden v the United Kingdom* [GC], no. 13378/05, 29 April 2008, § 63.

[54] *Taddeucci and McCall v Italy,* above note 4, § 85.

implication is that, as dissenting Judge Sicilianos argued, the judgment is 'tantamount to accepting *a contrario* that, within the meaning of Article 14 of the Convention, the situation of unmarried homosexual couples is comparable to that of married couples'.[55] The significance of this is that it opens the way for same-sex couples who are prohibited from marrying to claim that CoE member states that restrict rights and benefits on the basis of marriage (for different-sex couples) are discriminating against them on the grounds of sexual orientation. As Judges Spano and Bianku argue:

> if States decide to exclude same-sex couples from being able to marry, such a decision may have consequences when [the] Court is called upon to examine a claim of unjustified discrimination within a specific context that falls within the ambit of the right to respect for family life under Article 8 taken in conjunction with Article 14 of the Convention.[56]

THE COURT'S JURISPRUDENCE ON SEXUAL ORIENTATION DISCRIMINATION AND ASYLUM

In this section we consider the Court's jurisprudence on sexual orientation discrimination and asylum. We do so in the context of the Court never having upheld an application lodged by a gay man or lesbian alleging that their repatriation to a country of origin would constitute refoulement in violation of the Convention. As we explore below, the applicants have sought to develop different ways to articulate concerns about refoulement but they have generally tended not to focus on residency issues in asylum claims, even when these were relevant to their situation. The Court has interpreted the Convention as prohibiting the expulsion of individuals to countries where their life would be threatened in a way that would violate Article 2 (right to life), or where they would be subjected to forms of ill-treatment in violation of Article 3 (prohibition of torture).[57] In doing so, the Court has generally set a high threshold in respect of Articles 2 and 3 when assessing complaints relating to asylum and to trigger the

[55] Ibid, dissenting opinion of Judge Sicilianos, § 6.

[56] Ibid, concurring opinion of Judge Spano joined by Judge Bianku, § 2.

[57] See *Cruz Varas and Others v Sweden*, no. 15576/89, 20 March 1991, §§ 69-70; *Vilvarajah and Others v the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87, 30 October 1991, § 103; *Salah Sheekh v the Netherlands*, no. 1948/04, 11 January 2007, § 135.

protection of these Articles the ill-treatment complained of 'must attain a minimum level of severity'[58] and must involve a 'real' risk related to 'death or serious ill-treatment'.[59] The Court has described the assessment of the minimum level of severity of ill-treatment as relative and stated that it depends on all the circumstances of the case, 'such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.[60] However, despite establishing this framework for assessing complaints by asylum seekers, the Court has never accepted the claim of any gay man or lesbian that being deported to a country outside of the CoE would subject them to the real risk of death or serious ill-treatment in violation of the Convention.

The Court has disposed of applications made by gay and lesbian asylum seekers in a number of ways. Of 16 such cases, six have been declared inadmissible,[61] six have been struck out,[62] and one has been declared partially inadmissible and partially struck out.[63] The Court has delivered a judgment in only three of these cases and in two of them it found no violation of the Convention.[64] The only successful application lodged by a gay asylum seeker concerned the conditions of his detention in a CoE member state, rather than the issue of deportation to a country of origin.[65] Through a critical consideration of these cases we outline a number of ways in which the Court could have adopted a different approach that would have led it to enhance the protection of migrants seeking asylum in CoE member states on the grounds of their sexual orientation.

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[58] *Cruz Varas and Others v Sweden*, above note 57, § 83 in respect of Article 3.

[59] *Z. and T. v the United Kingdom* (dec), no. 27034/05, 28 February 2006, in respect of Articles 2 and 3.

[60] *Cruz Varas and Others v Sweden*, above note 57, § 83.

[61] *F. v the United Kingdom* (dec), above note 7; *I.I.N. v the Netherlands* (dec), above note 7; *Ayegh v Sweden* (dec), above note 7; *A.N. v France* (dec), above note 7; *H.A. and H.A. v Norway* (dec), above note 7; *M.B. v the Netherlands* (dec), above note 7.

[62] *Sobhani v Sweden* (dec), above note 7; *D.B.N. v the United Kingdom* (dec), above note 7; *K.N. v France and other applications* (dec), above note 7; *A.S.B. v the Netherlands* (dec), above note 7; *A.E. v Finland* (dec), above note 7; *A.T. v Sweden* (dec), above note 7.

[63] *M.B. v Spain* (dec), above note 7.

[64] *M.K.N. v Sweden*, above note 7; *M.E. v Sweden,* above note 7; *O.M. v Hungary,* above note 4.

[65] *O.M. v Hungary,* above note 4.

The asylum complaints that have been struck out

In accordance with Article 37 of the Convention (striking out), the Court is entitled to strike out an application where the circumstances lead to the conclusion that 'the applicant does not intend to pursue his application', 'the matter has been resolved', or that it is no longer justified to continue the examination of the application 'for any other reason established by the Court'. According to the same provision, 'the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires' and it 'may decide to restore an application to its list of cases if it considers that the circumstances justify such a course'.

One of the reasons the Court has given for striking out applications by gay and lesbian asylum seekers is that the national authorities concerned have, following an application to the Court by an asylum seeker, adopted measures removing the imminent risk of expulsion. In such circumstances the Court has often taken this to mean that the matter is resolved and the application can be struck out, even if the measures adopted by the national authorities do not entirely remove the possibility that an applicant will be deported to their country of origin in the future. For example, in *A.E. v Finland* national authorities granted the applicant – a gay man invoking Article 3 to resist his deportation to Iran – with a renewable, one-year residence permit and asked the Court to strike out the application. The applicant expressed the wish to maintain his complaint, arguing that the temporary residence permit 'did not take away the human rights violation' and that, if deported to Iran in the future, he would still be at risk of ill-treatment.[66] The Court struck out the application, noting that the applicant was not at risk of an imminent refoulement. Similarly, the Court partially struck out the application in *M.B. v Spain*, which was lodged by a Cameroonian woman seeking asylum on the grounds of her sexual orientation, on the basis that national judges had upheld the applicant's appeal and her request for asylum had to be reconsidered by domestic authorities.[67] The Court reached the same decision in *A.T. v Sweden*, concluding that since national authorities had accepted to examine a new asylum request by the applicant the matters of the case were resolved.[68]

[66] *A.E. v Finland* (dec), above note 7, § 26.

[67] *M.B. v Spain* (dec), above note 7, § 21.

[68] *A.T. v Sweden* (dec), above note 7, §§10-11.

A further, and sometimes connected, reason given by the Court for striking out applications by gay and lesbian asylum seekers is that, in light of a change in approach by national authorities at the communication stage of an application, an applicant is deemed to have raised matters before the Court prematurely. For example, in *K.N. and Others v France*, the Court struck out the case of an Iranian gay man as premature because, at the time of the decision, national authorities had changed the initial decision not to examine the applicant's asylum request and agreed to consider it. Similarly, in *A.T. v Sweden* and *M.B. v Spain*, the Court focused on the fact that, after the applicants had petitioned the Court, the national authorities had reconsidered their position and accepted to re-examine the applicants' requests for asylum. In these cases, although the Court could have waited for the national authorities to conclude their examinations of the asylum claims before reaching a decision, it decided to strike out the applications.

The Court's approach to striking out applications in this way has prompted some applicants to make the specific request that an examination of their application be continued on the grounds that, in accordance with Article 37 of the Convention, respect for human rights requires this. For example, in *A.T. v Sweden* the applicant asked the Court to maintain the examination of his application because the failure of domestic authorities to adequately consider his claims regarding sexual orientation meant 'there were special circumstances […] regarding respect for human rights'.[69] However, the Court decided that there were no such special circumstances and struck out the application. The Court also adopted a similar approach in a case that concerned serious issues relating to the applicant's family life. In *D.B.N. v the United Kingdom* the applicant, a Zimbabwean lesbian woman, alleged that, on the basis of her sexual orientation, she and her partner had been gang raped and had both become pregnant as a result, that her partner had committed suicide, and that she had attempted to take her own life. The applicant further alleged that she had been harassed by her family and members of the community, and had been admitted twice to hospital for serious injuries. Following the loss of contact between the applicant and her representatives, as well as the government's submission that the applicant had voluntary left the country, the Court struck out the application despite the applicant's representatives' request that 'the Court refrain from closing the application'.[70] Although the Court could have continued with an examination of the application in pursuance of Article 37, it decided to strike out the application on the basis that the applicant no longer wished to pursue

[69] Ibid, § 6.

[70] *D.B.N. v the United Kingdom*, (dec), above note 7.

her application.

The common feature of all of these cases is that the Court's decision was focused on the narrow issue of whether the applicants were subject to the threat of imminent deportation. If the Court had taken a more comprehensive approach to these applications it could have decided that, even though the applicants were no longer subject to imminent deportation, continuing with an assessment of the applications was justified on the basis that they raised issues regarding respect for human rights that required examination. On this basis the Court could have proceeded to consider the more general question raised in the applications of whether returning a gay man or lesbian to a country where they would be at risk of forms of ill-treatment gives rise to a violation of the Convention. Instead, it is apparent that the Court will strike out applications made by gay or lesbian asylum seekers resisting deportation even though, in some cases, whilst national authorities have removed the threat of imminent deportation, the potential future threat of deportation remains.

The asylum complaints that have been declared inadmissible

In accordance with Article 35 of the Convention (admissibility criteria), the Court is entitled to declare inadmissible a complaint at any stage of the proceedings when it is 'incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application' or when 'the applicant has not suffered a significant disadvantage, unless respect for human rights […] requires an examination of the application on the merits'.

The Court has generally justified decisions to declare applications by gay and lesbian asylum seekers inadmissible by stating that the situation in the applicants' countries of origin would not subject them, if returned there, to a real risk of harm contrary to the Convention. In *F. v the United Kingdom*, the Court established a number of significant principles in this respect. The Court clarified that the scope of the protection afforded to asylum seekers under Article 2 and Article 3 does not 'automatically apply under the other provisions of the Convention'.[71] As a consequence, the expulsion of a gay man or lesbian to a country outside of the CoE that criminalises private, consensual, adult same-sex acts does not amount to a violation of the right

[71] *F. v the United Kingdom* (dec), above note 7.

to respect for private life guaranteed by Article 8 of the Convention in the way that it would if the country concerned was inside the CoE. Moreover, the Court established that in order to prove the existence of a real risk of ill-treatment on the basis of sexual orientation, applicants cannot rely only upon the existence of criminal laws prohibiting same-sex acts but are required to provide evidence of 'a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships'.[72] Although evidence may exist to show that 'the general situation [in a country] does not foster the protection of human rights and that homosexuals may be vulnerable to abuse', this is not sufficient to establish that there are 'substantial grounds' for believing that a gay man or lesbian will be exposed to a real risk of ill-treatment contrary to Article 2 and Article 3.[73]

Gay and lesbian applicants have attempted to utilise Article 2 and Article 3 in ways that satisfy the principles established by the Court in order to pass the admissibility stage. In doing so, applicants have stressed that deportation to their country of origin would expose them, on the grounds of having had a same-sex relationship, to legal sanctions, ill-treatment and, possibly, death. For example, in *I.I.N. v the Netherlands* the applicant, an Iranian gay man, alleged that he had been caught by a policeman when kissing a male friend in an alley and that, as a result, he was arrested, forced to sign a statement in which he declared he was homosexual and subsequently raped by a policeman.[74] Similarly, in *A.N. v France* a Senegalese gay man claimed that he was blackmailed to keep his same-sex relationship secret and that, when his family and neighbors discovered his homosexuality, they attacked him and threatened to 'massacre him'.[75] In *M.B. v Spain* the applicant stated that she had to leave Cameroon after her late husband's family discovered she had had an intimate relationship with a same-sex partner. All of these applicants emphasized that in their countries of origin gay men and lesbians are not able to enjoy family life with a same-sex partner without risking serious ill-treatment and abuse. The Court found that none of the risks identified in these applications met the admissibility criteria for complaints under Articles 2 or 3 of the Convention.[76]

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[72] Ibid. See also: *I.I.N. v the Netherlands* (dec), above note 7.

[73] *F. v the United Kingdom* (dec), above note 7.

[74] *I.I.N. v the Netherlands* (dec), above note 7.

[75] *A.N. v France* (dec), above note 7, § 8. [Authors' translation]

[76] The Court reiterated this approach in the recent decision of *M.B. v the Netherlands* (dec), above note 7, concerning the removal of a gay man to Guinea. Notably, the Court observed that Guinean legislation criminalises

In *A.N. v France*, the Court can be seen to have increased the stringency of the admissibility criteria for applications by gay and lesbian asylum seekers. This is because, in response to evidence submitted by the applicant to show the existence of ill-treatment on the basis of his sexual orientation – specifically, a medical certificate attesting to the presence of several scars on his body, two testimonies confirming that he had been the object of an attack, and a letter from the an LGBT centre in France recounting the events behind his departure from his country of origin[77] – the Court stated that the two statements were 'too succinct and too little detailed', that the medical certificate was 'undated and issued by a person whose name does not correspond to any of the two names of doctors on the letterhead used for its drafting', and that the letter issued by the LGBT centre 'merely transcribe[d] the account of the events giving rise to the applicant's departure without attesting to facts.'[78] The Court can, therefore, be seen to have established a particularly high threshold for what it will accept as evidence of ill-treatment of an LGBT asylum seeker in a country of origin, which contrasts with the lower threshold set by the Court in cases concerning other asylum seekers.[79] Moreover, although the Court acknowledged that in Senegal same-sex sexual acts are a criminal offence and that reliable international sources confirmed that 'Senegal is one of the rare countries where individuals are prosecuted and convicted on this basis', it concluded that the criminal law was not 'systematically applied'[80] and, as a consequence, that there were 'no serious and current reasons to believe that the applicant would be exposed to real risks of treatment contrary to Article 3 in case of return to Senegal'.[81] Therefore, the Court can be seen to have raised the threshold at which the risk of ill-treatment resulting from the enforcement of laws criminalizing same-sex acts will trigger the protection of Article 3.

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homosexual acts but it concluded that 'there are no serious and current grounds for believing that the applicant would be exposed to real risks of treatment contrary to Article 3 in the event of his return to Guinea' (Ibid,§ 39).

[77] *A.N. v France,* above note 7, § 10.

[78] Ibid, § 44. [Authors' translation]

[79] For instance, in *R.C. v Sweden* (no. 41827/07, 09 March 2010) the Court considered a medical certificate submitted by an Iranian citizen to show that he had been tortured by Iranian authorities because of his activities as a critic of the regime. The Court concluded that, even though the certificate had not been written 'by an expert specialising in the assessment of torture injuries' and some of the scars may have been caused 'by means other than by torture' (Ibid, § 53), the applicant had substantiated his claim and, furthermore, that his deportation to Iran would give rise to a violation of Article 3 of the Convention (Ibid, § 57).

[80] *A.N. v France,* above note 7, § 41. [Authors' translation]

[81] Ibid, § 45. [Authors' translation]

In declaring these applications inadmissible the Court can be seen to have created a number of principles that may discourage gay and lesbian asylum seekers from commencing applications to the Court. Gay and lesbian asylum seekers may, for example, consider it almost impossible to convince the Court that the enforcement of laws criminalizing private and consensual same-sex sexual acts amounts to ill-treatment in violation of Article 3 of the Convention. They may further question whether it is possible to meet the evidential threshold set by the Court in respect of demonstrating ill-treatment on the grounds of sexual orientation in a country of origin. In short, the stringency of the admissibility criteria applied by the Court may be seen by many gay and lesbian asylum seekers as an insurmountable barrier to gaining protection under the Convention.

The asylum complaints that have been declared admissible

Despite the stringency of the admissibility criteria discussed above the Court has, between 2013 and 2016, declared two applications concerning sexual orientation discrimination and asylum admissible. In doing so, although the Court has had the opportunity to explain why these applications, unlike those discussed above, met the admissibility criteria it has simply stated that the applications were not 'manifestly ill-founded'[82] and provided no further details on its decisions. Nevertheless, in declaring these applications admissible the Court has been required to provide more substantial reasoning during its assessment of the merits of the applicants' complaints.

In *M.K.N. v Sweden* the Court addressed the complaint of an Iraqi national who unsuccessfully claimed asylum on the grounds that, *inter alia*, 'he had had a sexual relationship with another man and that, as a consequence, the Mujahedin was looking for him […] and that they had killed his partner'.[83] The Court concluded that this claim was not credible because there were inconsistencies in the applicant's account, that there had been a delay in raising these personal circumstances in national proceedings, and that the applicant had expressed an intention to live with his wife and children.[84] In reaching this view, the Court did not explain what further

[82] *M.K.N. v Sweden,* above note 7, § 16. See also: *M.E. v Sweden,* no. 71398/12, 26 June 2014, § 55.

[83] Ibid, § 43.

[84] Ibid.

evidence the applicant needed to provide in order to prove the existence of the same-sex relationship or consider the difficulty of providing such evidence. Moreover, the Court did not consider how certain social and cultural factors may have delayed the applicant in disclosing details of his same-sex relationship to national authorities. In this respect, the Court did not examine how an asylum seeker's experience of heteronormative and homophobic social relations in their country of origin may shape their individual perception of sexual orientation and limit their capacity to communicate it in ways that appear credible in a European context.[85] Overall, the Court's judgment can be seen to fail to grasp the complexity of sexual orientation and the vulnerability it might create for individuals in the circumstances of the applicant. In finding that the applicant's deportation would not give rise to a violation of Article 3, the Court did not therefore evolve its jurisprudence to provide protection for those seeking asylum on the grounds of sexual orientation in CoE member states.[86]

In the subsequent case of *M.E. v Sweden,* the Court considered the complaint of a Libyan national who had unsuccessfully applied for asylum in Sweden on the grounds that, inter alia, he had married a Swedish national of the same sex. According to Swedish law, the applicant was required to return to Libya and apply from there for family reunification with his husband in Sweden. The applicant advanced the claim that his expulsion to Libya would expose him to a real risk of ill-treatment in violation of Article 3[87] and that it would amount to an unjustified interference with his right to respect for family life, guaranteed by Article 8 of the Convention, because he would be separated from his husband.[88]

In respect of the Article 3 complaint, the Court acknowledged that in Libya all same-sex sexual acts are punishable by a term of imprisonment of five years,[89] but held that the implementation of the expulsion order against the applicant would not give rise to a violation of the

[85] For a critical analysis of the way in which social stigma, ostracism and discrimination are considered in respect of asylum cases, see L. Hooper, 'Back in the Closet: Should Concealment and Self-oppression as a Consequence of Stigma, Ostracism and Deep Rooted Universal Disapproval of Homosexuality be Considered as a 'Serious Harm'?'(2017) *Journal of Immigration, Asylum and Nationality Law*, 31, 4, 330-346.

[86] M.K.N. v Sweden, above note 7, § 43.

[87] *M.E. v Sweden,* above note 82, § 54.

[88] Ibid, § 91.

[89] Ibid, § 43.

Convention.[90] In reaching this judgment the Court reiterated its established view that if there is no 'information or public record of anyone actually having been prosecuted or convicted […] for homosexual acts'[91] laws criminalizing same-sex sexual acts do not amount to active persecution. Whilst reliable international sources reported episodes of homophobic attacks perpetrated by non-state agents in Libya, the Court stated that '[w]here the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence'.[92] This reasoning could be seen to establish an almost unreachable evidential threshold because, no matter what 'general' evidence an applicant produces about their country of origin, gay and lesbian asylum seekers are required to produce evidence that shows real risk in their own particular circumstances – something that those fleeing persecution created by the 'general situation' in a country of origin will struggle to provide.

A further problematic aspect of the Court's judgment is its failure to consider whether, in disclosing his sexual orientation during any proceedings at a Swedish embassy abroad, the applicant would expose himself to the risk of his sexual orientation and 'criminal' sexual relationship being exposed to domestic authorities. The Court had noted that there was no Swedish representation in Libya and the applicant would have to travel to a Swedish embassy in a neighbouring country to finalise his request for family reunification. Despite same-sex sexual relations between consenting adults being a criminal offence in Algeria and Tunisia, and despite 'several articles of the Penal Code [in Egypt having] been applied to imprison gay men in recent years',[93] the Court found 'no reason' to believe that in the short time-frame necessary to reach a Swedish embassy the applicant would be exposed to a risk of ill-treatment contrary to Article 3.[94] Relatedly and more generally, the Court noted that during his stay in Libya the applicant would have to be 'discreet about his private life' but concluded that this would not require him 'to conceal or supress an important part of his identity' in a way that amounted to a violation of Article 3.[95] This makes clear, therefore, the Court's view that if gay men and lesbians can avoid prosecution in a country of origin by concealing their sexual

[90] Ibid, § 90.

[91] Ibid, § 87.

[92] Ibid, § 74.

[93] Ibid, § 53.

[94] Ibid, § 89.

[95] Ibid, § 88.

orientation, national authorities can legitimately repatriate them without violating Article 3. This view was robustly rejected by dissenting Judge Power-Forde who stated:

> Having to hide a core aspect of personal identity cannot be reduced to a tolerable bother; it is an affront to human dignity – an assault upon personal authenticity. Sexual orientation is fundamental to an individual's identity and conscience and no one should be forced to renounce it – even for a while. Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity.[96]

The Court rejected the applicant's family life claim under Article 8 as manifestly ill-founded.[97] The Court recognised that the applicant's relationship with his husband fell within the ambit of family life and also acknowledged that the applicant's temporary expulsion would interfere with his and his husband's right to respect for family life.[98] However, the Court reiterated its established principle that, in cases where family life was created 'at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious', the removal of a non-national family member will be incompatible with Article 8 only in 'exceptional cases'.[99] It could be argued that the expulsion, for a period of some months, of a married gay man to a country where same-sex sexual acts are a criminal offence does disrupt family life in an 'exceptional' way. Indeed, such an expulsion would mean that the applicant would be exposed to the risk of being ill-treated and persecuted and, moreover, his husband would also be exposed to such risk if he travelled with the applicant. However, since the Court rejected that the situation in Libya was severe enough to trigger Article 3, it predictably denied that the applicant's circumstances were exceptional so as to engage the national authorities' obligations under Article 8.

[96] Ibid, dissenting opinion of Judge Power-Forde.

[97] Ibid, § 102.

[98] Ibid, § 95.

[99] Ibid, § 97.

The applicant in *M.E. v Sweden* requested that the case be referred to the Grand Chamber; a request which the panel of the Grand Chamber granted.[100] Subsequent to this, the national authorities decided to re-examine the applicant's case of their own motion and, as a result of this, granted the applicant a permanent residence permit in Sweden.[101] In light of this, the Government requested the Court to strike out the application. The applicant, however, requested that the Court continue with its examination of the case because, inter alia, the matter before the Court had not been resolved since it encompassed not only the question of whether the applicant's potential future removal to Libya would violate Article 3 but also the question of whether the previous decisions of the Swedish authorities had been in violation of Article 3. The applicant's request therefore provided the Grand Chamber with the opportunity to consider whether, at the time they had taken their decisions, the national authorities would have exposed the applicant to a real risk of inhuman or degrading treatment in violation of the Convention. Moreover, the Grand Chamber also had the opportunity to assess the reasoning adopted by the majority of the Chamber in its judgment on the merits of the case. However, in line with its established practice that we discussed above, the Grand Chamber chose not to continue an examination of the case under Article 37 of the Convention and, instead, regarded the matter complained of to have been resolved by the national authorities granting the applicant permanent residence in Sweden. In finding that there were 'no special circumstances regarding respect for human rights […] which require the continued examination of the case',[102] the Grand Chamber did not take the opportunity to either confirm or overturn the Chamber's approach. Consequently, the Grand Chamber can be seen to have implicitly endorsed the problematic findings of the Chamber and significantly diminished the substance of the applicant's claims.

The asylum case that was successful

The Court recently took the significant step, in *O.M. v Hungary*, of finding that national authorities had violated a gay man's rights under Article 5 (right to liberty and security) of the Convention because, when deciding to detain him during his asylum application, they had not undertaken an 'adequate reflection' on his 'individual circumstances' and, specifically, on the

[100] *M.E. v Sweden* (striking out) [GC], no. 71398/12, 08 April 2015, § 8.

[101] Ibid, §§26-27.

[102] Ibid, § 37.

fact that he is a 'member of a vulnerable group by virtue of belonging to a sexual minority.'[103] The applicant, an Iranian national who had applied for asylum in Hungary on the grounds of his sexual orientation, was, because he had no documents proving his identity or nationality, detained for nearly two months before obtaining the status of a refugee.[104] During this period of detention, the applicant unsuccessfully requested to be either released or transferred to an open facility, explaining that it was difficult for him, as a gay man, 'to cope with the asylum detention for fear of harassment' from other detainees.[105] The Court upheld the applicant's claim under Article 5(1) that his detention had been 'arbitrary and not remedied by appropriate judicial review'.[106] The Court also emphasised that the national authorities had failed to consider the extent to which the applicant was unsafe in custody among other detained persons, 'many of whom had come from countries with widespread cultural or religious prejudice' against sexual minorities.[107] Moreover, the Court clarified that 'the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee'.[108] Although this judgment is important in recognizing the vulnerability of gay men and lesbians who are fleeing prosecution and discrimination, it does not evolve the Court's jurisprudence in such a way to enhance the protection available under the Convention to gay and lesbian asylum seekers who are attempting to resist expulsion from a CoE state to a country of origin.

Evolving the jurisprudence on sexual orientation discrimination and asylum

If it is accepted that the Court's jurisprudence on sexual orientation discrimination and asylum requires evolution in order to better protect gay and lesbian asylum seekers, then this evolution could be achieved by the Court taking one or more of a number of steps. For example, the Court could evolve its jurisprudence by following the approach it took in *N. v Sweden* which concerned an Afghan woman who claimed that her deportation to Afghanistan would expose her to a real risk of ill-treatment because, in Sweden, she had started a relationship with a man

[103] *O.M. v Hungary,* above note 4, § 53.

[104] Ibid. The Court considered the period of detention from the 25th of June to the 22nd of August 2014. See Ibid, § 54.

[105] Ibid, § 14.

[106] Ibid, § 25.

[107] Ibid, § 53.

[108] Ibid.

and intended to separate from her husband.[109] In this case, unlike in cases related to sexual orientation discrimination, the Court assessed the applicant's claim by taking into account a wide range of social, legal and cultural factors. Although the Court noted that there were no specific circumstances substantiating the applicant's claim that she would be subjected to ill-treatment by her husband,[110] it focused on the 'particular risk of ill−treatment' to women in Afghanistan who are 'perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system'.[111] On this basis, the Court held that there were 'cumulative risks of reprisals' from 'her husband […], his family, her own family and from the Afghan society'[112] and, therefore, that her deportation to Afghanistan would amount to a violation of Article 3. If the Court took this approach to assessing the 'real risk' of returning gay men and lesbians to countries outside of the CoE it could more comprehensively consider whether social stigmatization of and discrimination against gay men and lesbians, combined with state-sponsored homophobia in the form of laws criminalizing same-sex sexual acts, constitutes a cumulative risk that amounts to a violation of Article 3.

Furthermore, in respect of the risk posed to gay and lesbian asylum seekers, the Court could apply the principle established in *NA. v the United Kingdom* that 'in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment' the protection of Article 3 enters into play 'when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned'.[113] The Court could utilize this principle to accept, for example, that the existence of laws criminalizing all same-sex sexual acts in a country constitutes a serious reason to believe that a gay man or lesbian is a member of a group systematically exposed to a practice of ill-treatment and, on this basis, provide protection from such ill-treatment under Article 3.

[109] *N. v Sweden*, no. 23505/09, 20 July 2010, § 47.

[110] Ibid, § 58.

[111] Ibid, § 55.

[112] Ibid, § 62.

[113] *NA. v the United Kingdom*, no. 25904/07, 17 July 2008, § 116. See also *Salah Sheekh v the Netherlands*, above note 57, § 148; *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011, §§ 217-218; *J.K. and Others v Sweden* [GC], no. 59166/12, 23 August 2016, § 103.

In addition, the Court could draw upon a recent judgment by the Grand Chamber in *F.G. v Sweden* to reject the notion that a gay man or lesbian should seek to avoid persecution in their country of origin by exercising restraint in expressing their sexual orientation.[114] In that case, the Grand Chamber addressed the claim of an Iranian national who complained that national authorities had not carried out a specific assessment of the risks created by his expulsion to Iran because of his conversion to Christianity in Sweden. The national authorities had considered it 'not plausible' that Iranian authorities would be aware of the applicant's religious conversion and, therefore, that he would be exposed to a real risk of persecution because of it.[115] However, the Grand Chamber stated that the applicant belonged to a group of persons who 'could be at risk of treatment in breach of Articles 2 and 3 of the Convention upon returning to Iran'[116] and that he had presented various documents showing 'how he intends to manifest [his Christian faith] in Iran if the removal order is executed'.[117] In light of this, the Grand Chamber held that there would be a violation of Articles 2 and 3 of the Convention 'if the applicant were to be returned to Iran without a proper *ex nunc* assessment by the Swedish authorities of the consequences of his religious conversion'.[118] Although the focus of the Grand Chamber was on the procedural aspects of Article 2 and Article 3, it is clear that it recognized that the situation in Iran would expose the applicant to a serious risk of death or ill-treatment. On this basis, the Grand Chamber can be seen to implicitly suggest that, even if the national authorities had complied with the procedural requirements imposed by Article 2 and Article 3, the deportation order issued against the applicant amounted to a substantive violation of these Articles. This was certainly the view of five of the sitting judges in this case who explicitly stated that 'the applicant's deportation to Iran […] equates to a violation of principles deeply enshrined in the universal legal conscience' and, as such, constitutes a substantive violation of Article 2 and Article 3.[119] The Court could apply this same principle to gay or lesbian asylum seekers and state that returning such a person to a country that criminalizes same-sex sexual

[114] F.*G. v Sweden* [GC], no. 43611/11, 23 March 2016 (see also: F.*G. v Sweden,* no. 43611/11, 16 January 2014).

[115] F.*G. v Sweden,* no. 43611/11, 16 January 2014, § 8. The Chamber judgment upheld the argument of national authorities and found that if repatriated the applicant would not be exposed to a risk of ill treatment on the grounds of his religious beliefs. See Ibid, § 42.

[116] *F.G. v Sweden* [GC], no. 43611/11, 23 March 2016, § 156.

[117] Ibid, § 157.

[118] Ibid, § 164.

[119] Ibid, joint separate opinion of Judges Ziemele, De Gaetano, Pinto De Albuquerque and Wojtyczek, § 12. See also the separate opinion of Judge Sajó.

acts opens up the potential for criminal prosecution that 'represents a flagrant denial of justice'.[120]

If the Court applied the above principles from its established jurisprudence to the applications regarding asylum brought by gay men and lesbians then it could establish that a failure by national authorities to adequately assess the risks faced by gay men and lesbians in their country of origin because of their sexual orientation amounts to a violation of the procedural limbs of Article 2 or Article 3 of the Convention. Moreover, the Court could establish that expelling a gay man or lesbian to country that criminalizes same-sex sexual acts, where such persons would be required to conceal or supress their sexual orientation to avoid ill-treatment or death, amounts to a substantive violation of Article 2 or Article 3. If the Court took these steps it would recognize that returning a gay or lesbian asylum seeker to a country of origin that criminalized same-sex sexual acts curtails the potential to have a private and a family life in a way that 'attains a level of severity such as to constitute an affront to human dignity'.[121]

CONCLUSIONS: A TWO TRACK APPROACH

In this article we have examined the Court's jurisprudence on sexual orientation discrimination and migration. In doing so, we have critically considered the jurisprudence relating to residency rights for bi-national same-sex couples who wish to live in a member state of the CoE. We have also critically considered the jurisprudence relating to asylum and sexual orientation discrimination that has resulted from applications brought by migrants refused asylum on the grounds of their sexual orientation in a member state of the CoE. Our principal aim has been to illuminate the strengths and weaknesses of the Court's approach to dealing with claims by gay men and lesbians in respect of these two aspects of migration.

Our analysis shows that the Court has created a 'two track' approach for dealing with residency and asylum complaints brought by gay men and lesbians. On the one hand, the Court has recognised that the exclusion of same-sex couples from immigration provisions relevant to different-sex couples amounts to a violation of Article 8 taken in conjunction with Article 14 of the Convention. The Court has, therefore, interpreted the family life limb of Article 8 in such

[120] Ibid, § 11.

[121] *Identoba and Others v Georgia*, above note 19, § 65.

a way to secure the right of bi-national same-sex couples to live together in a CoE member state on the basis of an intimate relationship and, furthermore, has clarified that national authorities must avoid enforcing immigration provisions that indirectly disadvantage bi-national same-sex couples. Moreover, the Court has recently held – for the first time – that the impossibility of having a same-sex relationship legally recognised places same-sex couples in a different situation to 'heterosexual partners who [have] decided not to regularise their situation'[122] and, because of this, if CoE member states make residency provisions for bi-national different-sex married couples they must extend these to unmarried same-sex couples. This principle has significantly evolved the Court's jurisprudence on the residency rights of same-sex couples and it provides scope to further address other aspects of sexual orientation discrimination in respect of marriage.

On the other hand, the Court has never upheld the complaint of a gay or lesbian asylum seeker who claims that their deportation to a country that criminalizes same-sex sexual acts would amount to a violation of the Convention. The only successful case lodged by a gay asylum seeker concerns the measures that national authorities must apply to address discrimination against migrants on the grounds of sexual orientation in the context of asylum detention. As such, whilst the Court has recognised that gay and lesbian asylum seekers are 'unsafe' when held in custody in a CoE member state with other persons that originate from countries with a homophobic legal system or culture,[123] it has consistently refused to protect gay men and lesbians from being expelled to countries where homophobia is culturally engrained and enforced by means of the criminal law. The Court's approach ignores the multi-faceted impact on the private and family life of gay men and lesbians who face the threat of deportation to a country outside of the CoE where they will be required to live in circumstances that put them at risk of ill-treatment or death. The Court continues to refuse to establish the principle that deporting a person from a CoE member state in these circumstances would be a violation of the Convention.

The Court's conservative approach to sexual orientation discrimination and asylum is, therefore, strikingly different to its dynamic approach to the residency rights of bi-national same-sex couples. It remains to be seen how long the Court's two track approach can endure

[122] *Taddeucci and McCall v Italy,* above note 4, § 85.

[123] *O.M. v Hungary*, above note 4, § 53.

given that a gay man or lesbian seeking to migrate to a CoE member state now has protection under the Convention if they are in an intimate same-sex relationship with a national of a CoE member state. The potential for the Court to continue to extend that protection to bi-national same-sex couples, but refuse to extend it to gay and lesbian asylum seekers fleeing persecution, seems untenable in the long-term. At the very least, this is because gay and lesbian asylum seekers will inevitably attempt to utilize the Court's jurisprudence on the residency rights of same-sex couples to address their particular immigration problems. Although the issues raised by bi-national same-sex couples who are discriminated against by immigration provisions in a CoE member state, and the issues raised by asylum seekers refused asylum on the grounds of sexual orientation in CoE member states, are somewhat different they also have very much in common. Both bi-national same-sex couples and gay and lesbian asylum seekers are, in essence, attempting to live in a CoE member state in order that they may establish a private and family life without the risk of persecution and harm. Therefore, by establishing protection against discrimination for migrants seeking residency in a CoE member state in order to establish a family life on the basis of a same-sex relationship, the Court has provided asylum seekers with a means by which to argue that, they too, should be protected from having to live in circumstances where they would have no opportunity to establish a family life.

FIGURE

Figure 1